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NO. 87-2003

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PEOPLE OF THE STATE OF ILLINOIS, Petitioner

-vs-

ALEJANDRO HERNANDEZ, Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ILLINOIS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities.	ii
Jurisdiction.	1
Statement of the Case	2
Reasons for Denying the Writ.	6
Conclusion.	15

TABLE OF AUTHORITIES

CASES	Page
Alexander v. State, 562 S.W.2d 207 (1977) (Tenn. Crim. App.) . .	13
Bruton v. United States, 391 U.S. 123 (1968)	8
Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984) cert denied, 470 U.S. 1055 (1985).	13
Fox Film Corp. v. Muller, 296 U.S. 207 (1935).	9
ILL.CONST. 1970, art. 1, sec. 8.	8
Ill.Rev.Stat. 1985, Ch. 38, Sec. 114-8	6,7
People v. Bean, 109 Ill.2d 80, 485 N.E.2d 349 (1985)	6
People v. Bell, 302 N.Y.S.2d 946, 32 A.D.2d 781 (1969)	14
People v. Buckminster, 274 Ill. 435, 113 N.E.2d 13 (1916). . . .	7
People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959).	6,7
People v. Daugherty, 102 Ill.2d 533, 468 N.E.2d 969 (1984) . . .	6,7
People v. Duncan, 115 Ill.2d 429, 505 N.E.2d 307 (1987).	6
People v. Hernandez, 121 Ill.2d 293, 521 N.E.2d 25 (1988). . . .	6,14
People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950)	7
People v. Johnson, 13 Ill.2d 619, 150 N.E.2d 597 (1958).	7
People v. Johnson, 116 Ill.2d 13, 506 N.E.2d 563 (1987).	8
Michigan v. Long, 463 U.S. 1032 (1983)	9
Richardson v. Marsh, 481 U.S. at ____, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).	6,10
United States v. Brierly, 501 F.2d 1024 (8th Cir. 1974) cert denied, 419 U.S. 1052 (1974).	13
United States v. Danzey (2nd Cir. 1979), 594 F.2d 905, 917 cert. denied, 441 U.S. 951 (1979).	13
United States v. Diaz, 836 F.2d 385 (8th Cir. 1987).	13
United States v. Petit, 841 F.2d 1546 (11th Cir. 1988)	13

JURISDICTION

This Court lacks jurisdiction to consider the petition for writ of certiorari. The judgment of the Illinois Supreme Court rests on adequate and independent State grounds. Jurisdiction in this Court is therefore lacking. 28 U.S.C. sec. 1257(3). An elaboration of these reasons for lack of jurisdiction is provided in the section in this brief entitled Reasons for Denying the Writ.

STATEMENT OF THE CASE

The statement of the circumstances of the case provided in petitioner's brief is incomplete. Most notably, no physical evidence was connected to respondent. This, despite a two-year investigation which produced literally dozens of pieces of physical evidence. This included evidence gathered from the home where the incident occurred, and a deserted area where the deceased was later discovered.

For example, there were as many as four separate and distinct shoe prints discovered at the home. (R. 2095, 3601, 3690, 3784) Respondent voluntarily produced two different pairs of shoes for purposes of scientific comparisons to these prints. (R. 1201-1202, 1520, 1554) Not a single shoe print matched or compared in any manner to respondent's shoes. (R. 1201, 1881, 3784, 4376) Authorities also discovered tire tracks in the driveway and along the curb of the home. (R. 3668-3784) None of these tire tracks matched to any car connected to respondent, his family, or friends. Two fibers were discovered from the front door of the home, neither of which matched the respondent's clothing, even though he voluntarily produced various pieces of his clothing for comparison. (R. 3659-3661, 4147) Additionally, an article of blue denim material was discovered near the deceased's body, and later traced to the body by trained police dogs, but it was not linked to the respondent. (R. 3945, 4437-4439, 9183-9185) Two new fibers were also found near the deceased, but these did not match or compare to clothing worn by

respondent. (R. 4119, 4123, 4156) A plaster cast of a footprint near the deceased, as well as three separate pairs of shoeprints in that area did not compare to respondent's shoes. (R. 4163-4164, 6650) No murder weapon was discovered and linked to respondent. Similarly, scientific examinations recovered hair standards and seminal fluid from the deceased's body. These also were not connected to the respondent. Some hair standards were later claimed to have been misplaced. Blood-type testing on the seminal fluid evidenced to one expert that it "could have come from any male person." (R. 4147, 4581, 4582, 4606)

Perhaps the most dramatic development in the collection of physical evidence was the discovery of eight latent fingerprints in the deceased's home where the incident occurred. The fingerprints were suitable for comparison, but not a single print matched or compared to the respondent's fingerprints. (R. 5108, 5119, 5150, 6641, 6654) Similarly, the fingerprints did not compare to any of the deceased's family, friends or relatives who were frequent visitors to the home. (R. 5015) The fingerprints also did not compare to the codefendants in this case. (R. 5015)

The statement of the circumstances of the case by petitioner is also incomplete in regard to the inconsistent statements of respondent upon which the prosecution's case at trial rested. A unanimous Illinois Supreme Court explained the nature of these inconsistencies in the following manner:

> To explain the defendant's statements, counsel's theory of defense was that his client had invented the "Ricky" stories in order to obtain the well-publicized $10,000 reward which was being offered. Evidence of that intent is manifest in the defendant's

> admission to Jackie Estremera that he was not going to tell the police anything until he received the reward money. Moreover, it is undisputed that the defendant was shown boxes full of money by officers investigating the case and promised not only payment of a reward, but also employment opportunities in return for more detailed information.
>
> People v. Hernandez, 121 Ill.2d 293, 306-307, 521 N.E.2d 25, 31 (1988).

Finally, petitioner's dissertation of the circumstances of the case is also incomplete with regard to the evidence involving the State's chief witnesses, Jackie Estremera and Armindo Marquez. A unanimous Illinois Supreme Court considered these witnesses in the following manner:

> Defense counsel has also attacked the credibility of Jackie Estremera and (Armindo) Marquez, claiming that their testimony must be discounted because they had reasons to fabricate the defendant's inculpatory admissions. Estremera faced possible felony contempt sanctions for having failed to appear as ordered before the special grand jury investigating the Nicarico murder, and the defendant contended that Estremera concocted the defendant's confession because he feared spending time in jail. Marquez, on the other hand, was already in jail charged with multiple counts of residential burglary. Although he had prior burglary convictions and there was reason to believe that Marquez was responsible for at least 100 unsolved burglaries in Kane and surrounding counties, the Kane County State's Attorney's office recommended a minimum sentence in exchange for a guilty plea. Defense counsel introduced a portion of the transcript from Marquez' sentencing hearing held in June 1983, where the Assistant State's Attorney, Thomas Sullivan, said:
>
> > "I might comment at this time that this recommendation of four years, which is the minimum for residential burglary, Mr. Marquez, is based primarily upon your cooperation with the police, specifically Detective Atchison, and

> also Assistant State's Attorney Tom Knight of DuPage County, who also recommended that your case be viewed with leniency. Otherwise you would not be offered this 4-year sentence."
>
> As a witness for the State in this case, Assistant State's Attorney Sullivan denied that Marquez ever requested consideration of his cooperation with DuPage County prosecutors in the Kane County proceedings, and he testified in response to the prosecutor's inquiry: No, Mr. Knight, you never spoke to me directly about that.
>
> Hernandez, 121 Ill.2d at 305-306, 521 N.E.2d at 32.

Finally, although the prosecution's theory at trial was that respondent and codefendants Rolando Cruz and Stephen Buckley jointly committed the crimes, Buckley's trial resulted in a hung jury. This of course means that some jurors voted to convict while one or more voted not to convict. The cause against Buckley was subsequently dismissed on motion of the prosecution.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE ADEQUATE AND INDEPENDENT STATE GROUNDS, TO WIT, THE VIOLATION OF STATE SEVERANCE LAW AND THE STATE CONSTITUTION, ESTABLISH A JURISDICTIONAL DEFECT.

In a unanimous decision, the Illinois Supreme Court made it clear that its decision to reverse was predicated upon a "violation of this court's precedents and an error of constitutional magnitude." People v. Hernandez, 121 Ill.2d 293, 521 N.E.2d 25, 32 (1988) (emphasis added.). The Illinois Supreme Court accordingly held that the state law violation was predicated upon Illinois severance law. See Ill.Rev.Stat. 1985, Ch. 38, Sec. 114-8. In specifically rejecting the notion that this case was predicated upon recent Federal constitutional decisions of this Court, but was rather based on state severance law, the Illinois Supreme Court stated unequivocally:

> The defendant does not claim that this is a case of "contextual implication" like that recently decided by the Supreme Court in Richardson v. Marsh, (1987), ___ U.S. ___, 107 S.Ct. 1702, 95 L.Ed.2d 176, so this case does not present the question of whether Richardson will effect Illinois law as defined by Duncan (People v. Duncan, 115 Ill.2d 429, 505 N.E.2d 307 (1987)) and its predecessors.
>
> Hernandez, 121 Ill.2d at 312, 521 N.E.2d at 34.

The predecessor cases relied upon by the court and/or applying Illinois severance law include People v. Daugherty, 102 Ill.2d 533, 468 N.E.2d 969 (1984), People v. Bean, 109 Ill.2d 80, 485 N.E.2d 349 (1985), People v. Clark, 17 Ill.2d 486, 162 N.E.2d

413 (1959) and People v. Johnson, 13 Ill.2d 619, 150 N.E.2d 597 (1958).

The principles of Illinois severance law are rudimentary. Before trial a defendant may request a severance if it appears that he will be prejudiced by a joinder of related prosecutions or defendants. Ill.Rev.Stat. 1985, Ch. 38, Sec. 114-8. The pretrial motion must show the prejudice that the defendant would suffer. People v. Daugherty, 102 Ill.2d 533, 468 N.E.2d 969 (1984); People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959). Generally, defendants jointly indicted are to be tried together unless the circumstances are such that a defendant will be deprived of a fair trial if there is a joint trial. Id. An unfair joint trial results for lack of severance where statements of a non-testifying codefendant are either introduced naming the defendant or introduced by redaction with euphemisms identifying the defendant. Id; see also People v. Johnson, 13 Ill.2d 19, 150 N.E.2d 597 (1958); People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950); People v. Buckminster, 274 Ill. 435, 113 N.E.2d 13 (1916).

In the present case, the Illinois Supreme Court ruled that state several law was violated and an unfair trial resulted where improper redactions identified respondent-defendant in the statements of his non-testifying codefendant. As stated by the court on the factual basis of the claim:

> Prior to the commencement of trial, the defendant and his codefendants made multiple motions for severance and then for separate juries after the severance motions were denied. The defendant argues that these motions were improperly denied, and that as a result statements made by

> (codefendant) Cruz were admitted at trial over objection and with insufficient redaction...
>
> Hernandez, 121 Ill.2d at 309, 521 N.E.2d at 32.

Accordingly, this case was separately litigated on the basis of state severance law independent from federal constitutional error. The Illinois Supreme Court recognized this distinction and rendered an opinion finding an independent violation of Illinois law.

The Illinois Supreme Court's decision also was predicated adequately and independently on a violation of the Constitution of the State of Illinois. ILL. CONST. 1970, art 1, sec. 8. The court specifically stated that the asserted rights violated in the present case included "defendant's right to confront and cross-examination witnesses against him, a right guaranteed by both the State and Federal constitutions." Hernandez, 121 Ill.2d at 309, 521 N.E.2d at 32. The court cited specifically to its precedents in People v. Johnson, 116 Ill.2d 13, 506 N.E.2d 563 (1987), and People v. Buckminster, 274 Ill. 435, 113 N.E. 713 (1916). Of course, the Illinois Supreme Court recognized the separate Federal constitutional implications of this case under Bruton v. United States, 391 U.S. 123 (1968). However, the Illinois Supreme Court was careful to delineate that the constitutional violations considered were independent, as the court repeatedly stated that the case here encompassed both "Bruton and Buckminster errors." Hernandez, 121 Ill.2d at 309, 314, 521 N.E.2d at 33, 35.

For the reasons elaborated above, this Court should deny the writ because the decision of the Illinois Supreme Court rested on

adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032, 1040, 1041 (1983). In Long, this Court stated succinctly:

> [R]espect for the independence of state courts as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground....If the state court decision indicates clearly and expressly that it is alternatively based on bonafide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.
>
> 463 U.S. at 1040-1041.

As stated also by this Court a half-century ago: "[O]ur jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). Moreover, this Court has indicated that rendering advisory opinions is a limitation on its jurisdiction: "[I]f the same judgment would be rendered by the state court after we corrected its view of Federal laws, our review could amount to nothing if more than an advisory opinion." Long, 463 U.S. at 1041. As explained above, this is particularly true in the present case. Therefore, this Court should deny the writ.

II.

THE WRIT SHOULD ALSO BE DENIED BECAUSE THIS CASE DOES NOT BY ANY MEANS BRING INTO QUESTION THE VALIDITY OF THE DECISION IN RICHARDSON V. MARSH.

Regardless of the adequate and independent state grounds for the Illinois Supreme Court decision, nothing in this case brings into question the decision of this Court in Richardson v. Marsh,

481 U.S. at ___, 107 S.Ct. 1702, 95 L.Ed.2d 196 (1987). Richardson simply held that under the Federal constitution "the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." 481 U.S. at ___, 107 S.Ct. at 1709, 94 L.Ed.2d at 188. Respondent-defendant certainly concurs. But, as the Illinois Supreme Court found, this was not such a case. Here, numerous statements by the non-testifying codefendant were introduced redacted with reference to the respondent-defendant. The redactions included "friends" (where numerous State witnesses testified that the defendants were friends, including two witnesses called solely to testify to their friendship), "friends [from] Aurora" (where State witnesses were prompted to testify that the defendants were friends from Aurora, Illinois), "named individuals", and "two named individuals." As held by the Illinois Supreme Court on the improper redactions:

> The defendant here was plainly incriminated by the reference to "friends" not only because of the State's repetitive attempts to establish friendship but also by the prosecutor's closing argument, in which he linked the "friends" evidence to admissions made by (codefendant) Cruz and the defendant:
>
> > "[T]he evidence is clear that Cruz and Hernandez are both acquainted with Buckley. If Buckley kicked the door in, all right. What does that tell you about those admissions they made? Not only are they friends---
> >
> > MR. JOHNSON: Objection, you are Honor. I object to that as contrary to law.

* * * * * *

THE COURT: So far it's proper argument. May continue.

MR. KNIGHT: You've seen that they're friends. They live in the same neighborhood. They're all in the same proximity with respect to the victim's home. And I'm using it only in the direction of Cruz and Hernandez because the fact is that they've made statements which are directed as admissions against them.

Okay. But they are also friends of Buckley's.

MR. JOHNSON: Objection, judge. That inference is improper.

THE COURT: Confine--

MR. KNIGHT: This is only--

THE COURT: Confine it to the evidence now and relate it in that fashion.

MR. KNIGHT: This is only to Cruz and Hernandez I'm talking about. Okay. They're friends. They're neighbors. Therefore, when they make admissions that they committed this crime, it's much more--

MR. JOHNSON: Objection.

THE COURT: Objection sustained.

MR. WESOLOWSKI [defendant's counsel]: It's improper."

Hernandez, 121 Ill.2d at 313-314, 521 N.E.2d at 34-35. (emphasis original.)

Additionally, the Illinois Supreme Court found other improper references to the existence of respondent-defendant in the redacted statements. The court observed on these improprieties:

> Use of "friends" in the redacted statements was not limited to those three circumstances previously quoted. Notwithstanding the trial court's directions that "friends" was not to be used in redacting the admissions. Statements made by the

> defendant and properly admissible against him were also edited, and reference to the codefendants were replaced with "some friends" in the testimony of Sgt. Roberson and "two other named individuals" in Lt. Winkler's. No imagination was required for the jurors to conclude that when Lt. Winkler referred to "two other named individuals" in recounting the defendant's statement, the "two other named individuals" were the two codefendants seated next to the declarant. It was equally obvious that when Lt. Winkler testified that Cruz told him he was approached by "the named individuals" and asked "if he wanted to have sex with a little girl," Cruz had referred to the defendant.
>
> Hernandez, 121 Ill.2d at 315-316, 521 N.E.2d at 35. (emphasis original.)

Concluding its observations of the improper redactions, and similarly taking this case out of the decision in Richardson, the Illinois Supreme Court found separate grounds for a mistrial where the State informed the jurors that names were being withheld from them by redaction. As independently held by the Illinois Supreme Court:

> Aggravating the effect of those improper redactions was the State's disclosure to the jury that they were not hearing the full story. Twice the jury was informed during the direct examination of State witnesses that the admission being testified to had been redacted. As quoted above, the prosecutor asked Ramon Mares to continue his testimony "without mentioning any names of anybody." Also in the jury's presence the prosecutor told his witness Jackie Estremera that "I am going to ask you a series of questions about that conversation, but as I ask you those questions...do not mention the name of any other person to whom he [the defendant] referred." Thus, this case presents the same question posed in Hodson (People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950)) and Johnson (People v. Johnson, 13 Ill.2d 619, 150 N.E.2d 597 (1958)) because here, as there, it was obvious that the codefendant's statements had been altered to remove the names of non-declaring defendants. Informing jurors that a codefendant named other guilty people but that those names are being withheld is, by itself, grounds for a mistrial.

United States v. Danzey (2nd Cir. 1979), 594 F.2d 905, 917 [cert. denied, 441 U.S. 951 (1979)].

Hernandez, 121 Ill.2d at 316, 521 N.E.2d at 35-36.

Therefore, the reasoning of Richardson is hardly called into question here.

Finally, the State contends that certiorari should be granted because the Illinois Supreme Court has ostensibly aligned itself on the wrong side of an alleged "post-Richardson split." (State's cert. petition, p. 22) The "split" allegedly exists between United States v. Diaz, 836 F.2d 385 (8th Cir. 1987), and United States v. Petit, 841 F.2d 1546 (11th Cir. 1988). Both cases are actually fully consistent with the present one. In Diaz, the codefendant's statement was redacted so that the neutral term "someone" was substituted for the defendant's name. The Diaz court held that because there was no explicit direct reference to the defendant, Bruton was not violated. Significantly, the Diaz court further held that it would be error if the redacted statement alerted the jury to the fact that a name available to the prosecution had been purposely omitted. 836 F.2d at 390-391; see United States v. Brierly, 501 F.2d 1024 (8th Cir. 1974) cert denied, 419 U.S. 1052 (1974); Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984) cert denied, 470 U.S. 1055 (1985). As noted, this is precisely what occurred in the present case.

Similarly, in Petit, the court held that where the term "friends" is substituted, and other identifying evidence clearly reveals that the defendants are those whose names have been removed, it cannot be said that the redaction was lawfully accomplished. 841 F.2d at 1555-1557; see also, Alexander v.

State, 562 S.W.2d 207 (1977) (Tenn. Crim. App.), and People v. Bell, 302 N.Y.S.2d 946, 32 A.D.2d 781 (1969), both of which were cited by the Illinois Supreme Court in the present decision at People v. Hernandez, 121 Ill.2d 293, 315, 521 N.E.2d 25, 35 (1988)). There is nothing inconsistent here between Richardson, the present case, or the case law in general. The writ therefore should be denied.

For these reasons, the present case hardly calls into question the reasoning of this Court in Richardson v. Marsh, 481 U.S. at ____, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Moreover, because the present case rested upon adequate and independent State grounds, this Court should deny the writ.

CONCLUSION

For the foregoing reasons, respondent ALEJANDRO HERNANDEZ respectfully requests that this honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Please take notice that I have mailed the original and nine copies of the Response to Petition for Writ of Certiorari to the Clerk of the above Court and that I am serving the Attorney General and State's Attorney with three copies each, and I am serving the defendant with one copy by depositing the copies in the mail in Springfield, Illinois, with sufficient prepaid postage and addressed as indicated above on this 5th day of July, 1988.

GARY S. RAPAPORT
Assistant Defender

Subscribed and sworn to
before me on this 5th
day of July, 1988.

NOTARY PUBLIC

OFFICIAL SEAL
SHEILA ANN HUSTAVA
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 1-10-90